U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 08 December 2004

……..
In the Matter of

BENJAMIN GLOVER
Claimant
v.
PUERTO RICO MARINE; AIG CLAIM SERVICES
Employer/Carrier
And
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party in Interest

Case No. 2003 LHC 1558
OWCP No. 6-103116

……

Decision and Order

This matter involves a Motion for Modification of a previously denied claim filed under the Longshore Act by Benjamin Glover of Jacksonville, Florida. A hearing on Glover's motion convened on December 12, 2003. At the request of counsel, the briefing period was extended, and eventually both parties filed their comments on September 14, 2004.

The record shows that Claimant injured his right knee in 1985, re-injured it on February 18, 1987; injured his left leg on July 13, 1990; injured his right elbow on June 5, 1992; and injured his left arm and ribs in 1993. The compensability of these injuries is not in dispute. He reached maximum medical improvement (MMI) for the February 18, 1987 injury on June 19, 1989, and reached MMI for the June 5, 1992 injury on July 17, 1992. Claimant's average weekly wage is $943.14 for the February 18, 1987 injury, $1214.54 for the July 13, 1990 injury, and $1092.98 for the June 6, 1992 injury. On July 20, 1992, he returned to his job full time at a pay rate of $19.00 per hour working as a refrigeration mechanic at Puerto Rico Marine.

On July 20, 1994, Judge Earl Thomas denied Glover's claim for permanent total and permanent partial disability benefits on the ground that claimant had returned to full time duty following all accident dates and with no decrease in his

wages; however he granted the claim for medical benefits under section 7 of the Act. Claimant timely requested reconsideration which was denied, and timely requested modification which was also denied. On July 18, 1996, Judge Murty, finding no mistake of fact and no change in Claimant's economic or physical conditions, denied Claimant's petition. The Board, on May 28, 1997, affirmed Judge Murty's ruling, and, subsequently, the 11th Circuit Court of Appeals affirmed on April 14, 1998, and issued its mandate on June 26, 2000. (EX 7; Tr. 22).

The subject of this proceeding is a Petition for Modification filed on June 26, 2000. (Tr. 5; Tr. 17). Claimant's injury-related medical expenses are still covered by Judge Thomas' order and are not in dispute. Claimant, who is still working with no actual loss of wage earning capacity, seeks a *de minimis* award of $1.00 per week, Tr. 39, on the ground that there is, allegedly, a significant potential that the injury will cause diminished earning capacity under future conditions. *See,* Metropolitan Stevedore Co. v. Rambo [Rambo II], 521 U.S. 121, 31 BRBS 54(CRT) (1997).

In Rambo II, the court held that a worker is entitled to nominal compensation when his work related injury has not diminished his present wage earning capacity under current circumstances, but there is a significant potential that the injury will cause diminished capacity under future conditions. Under Rambo II, the employee has the burden of showing by a preponderance of the evidence that he has been injured and that the odds are significant that his wage earning capacity will fall below his pre-injury wages at some point in the future.

Judges Thomas and Murty concluded that Claimant demonstrated no loss of wage earning capacity, and both the Board and the Eleventh Circuit Court of Appeals have agreed. The question before me is whether Claimant has experienced a change in condition or whether a mistake of fact was committed at the trial level in past adjudications which the appellate tribunals failed to detect and which otherwise justify modification.

Change of Condition

Claimant's new evidence consists of long list of recent injuries, including his several knee, finger, and shoulder injuries, and injuries to his trunk, leg, arm, foot, (See, Tr. 42), and that these injuries, his theory proceeds, show a potential for a severe injury and a corresponding significant potential for a reduction in wage earning capacity. Yet, the absence of any new medical evidence in the record

indicating any physical change in his condition or attributing any of these incidents to the work-related injuries that gave rise to the order which Claimant here seeks to modify, distinguishes his situation from Rambo II. *See*, Tr. 43, 45.

Claimant has been working for over a decade without an actual reduction in his wage earning capacity attributable to the injuries involved in the claims considered by Judge Thomas. The fact that he has been involved in other incidents unrelated to the those prior injuries shows merely a possibility that the old injuries could be related to some new occurrence, but in the absence of any medical evidence which establishes any such link, Claimant's theory is speculation unsupported by a preponderance of the evidence that a "significant potential" exists. Indeed, a potential for future injury and a possible loss of wage earning capacity exists in every case in which a worker returns to work, but that is not enough to satisfy the standard articulated by the court in Rambo II. In this instance, Claimant has not demonstrated any change in his physical condition related to his compensable injuries.

Nor has Claimant established a change in his economic condition. Now, 67 years of age, he testified that his knees still bother him and limit his ability to climb ladders, stoop, and bend, and limit his ability to work full time and overtime. Tr. 50-63. His current pay rate is $27.00 per hour; however, since the Employer went out of business, Claimant contends that his overtime opportunities with his new employer have declined, and some weeks he only works three or four days, Tr. 60-62. On cross-examination, Claimant acknowledged that he is still a refrigeration mechanic, and that he missed work for a number of different reasons and could not attribute any particular absence to the injuries involved here. He also acknowledged that he has been missing overtime since 1992, and that this is not a new development. Tr. 75.

Considering the evidence Claimant has adduced, it appears that the factors and circumstances before me are essentially the same as the factors and circumstances considered by Judges Thomas and Murty. The record establishes no change of condition that would warrant a modification of the prior orders entered in this matter.

Mistake of Fact

Claimant also alleges that a mistake in a determination of fact by Judges Thomas and Murty, led to the orders denying an award which were subsequently affirmed by the BRB and the Court of Appeals. As he did before Judge Murty,

Claimant introduced his medical exhibits, including the assessment by Dr. Brillhart, an orthopedist, who opined that Claimant should not engage in prolonged running, jumping, climbing, knee bending or standing. Dr. Brillhart opined that he will have to quit work eventually, leading Judge Murty to observe that Claimant may someday become disabled, but as of June 12, 1996, he had not made out a case of total disability, and had suffered no loss of wage earning capacity. Judge Murty accordingly found no mistake of fact in Judge Thomas' decision and no change in condition.

More than eight years have passed, and still the record reveals no change of condition. Moreover, having reviewed the evidence before Judge Thomas and Murty, I find no mistake in a determination of fact rendered in either of their decisions. Based upon Claimant's ten-year work history and medical history since Judge Thomas' original decision in 1994, and considering the record before me viewed in its entirety, it is clear Claimant has suffered no loss of wage earning capacity. Further, considering the record before Judge Thomas, Claimant, then, failed to establish by a preponderance of the evidence that there was a significant potential that the injuries would cause diminished earning capacity under future conditions, so there was no mistake in Judge Thomas' ruling. Having further considered the record before Judge Murty, I find that Claimant, again, failed to establish by a preponderance of the evidence that there was a significant potential that the injuries would cause diminished earning capacity under future conditions, so there was no mistake in Judge Murty's ruling. Finally, considering the record before me, I find that Claimant has still failed to establish by a preponderance of the evidence that a significant potential exists that the injuries will cause diminished wage earning capacity under future conditions. Accordingly;

ORDER

IT IS ORDERED that the Claimant's Request for Modification be, and it hereby is, denied.

A

Stuart A. Levin
Administrative Law Judge